GOVERNMENT OF ANDHRA PRADESH
ABSTRACT

Development of MachilipatnamPort Ltd.–- Cancellation of the Concession Agreement dated 07-06-2010 and resumption of the land handed over on lease of 412.57 Acres in 09-10-2008 to the Government with effect from the date of this G.O, while reserving liberty to claim compensation for the damages suffered by the Government in that regard from MPPL -Orders – Issued

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INDUSTRY, INFRASTRUCTURE, INVESTMENT AND COMMERCE DEPARTMENT

G.O.Ms.No.66 Dated 08-08-2019.

Read the following:

1. G.O.Ms.No.2, Infrastructure and Investment (Ports1) Department, Dated 30.01.2008
2. Concession Agreement, dated 21.04.2008
3. G.O.Ms.No.15, Infrastructure and Investment (Ports1) Department, dated 18.04.2008
4. Letter dated 07-11-2008 fromM/s.Vajra Sea Port Limited.
5. Letter dated 29-04-2009from MAYTAS
6. Letter Dated 28-08-2009 from M/s. Machilipatnam Port Ltd.
7. G.O. Ms. No.7, Infrastructure and Investment Department, dated 15-04-2010
8. Letter dated 27-08-2014 from M/s. Machilipatnam Port Ltd,
9. G.O. Ms. No.15, Energy, Infrastructure & Investment (Ports.1) Department, dated 12-05-2016

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ORDER

The project for development of Machilipatnam Deep Water Port was conceived in the year 2008 vide reference 1st read above and the project was awarded to a Consortium comprising of M/s. MAYTAS Infra Pvt Ltd-NCC-SREI-SCC. A detailed concession agreement was initially entered vide reference 2nd read above. In pursuance of the decision comprised in the reference 1st and 3rd read above, a special purpose vehicle (SPV) by name Vajra Sea Port Pvt. Ltd was incorporated by the developer to implement the terms and conditions of the concession agreement to be entered into by the parties.

2. In pursuance of the above concession agreement entered into on 21-04-2008, between the State and M/s. Vajra Sea Port Pvt. Ltd., the objectives, pre-conditions and the timelines within which the project was required to be developed by the developer through the SPV were outlined. The Agreement dated 21-04-2008 under Clause 4.3, incorporates the project implementation schedule in respect of the project and the commencement date is defined under Clause 1.9 to be the date on which the Agreement is executed that is 21-04-2008 (Zero Date) and the financial closure in respect therefore was to be achieved within 12 months from the Zero Date. On 08-08-2008,Vajra Sea Port intimated that the name of Vajra Sea Port Limited has been changed to Machilipatnam Sea Port Ltd and by a subsequent letter dated 07-11-2008, it was further requested that the Government recognizes the change of the SPV, to facilitate the receipt of various orders from the Government. In view of the difficulties faced by MAYTAS, a letter was communicated by MAYTAS on 29-04-2009 soliciting cooperation of the Government.

3. Vajra Sea Port Pvt Ltd renamed as Machilipatnam Port Pvt Ltd was held by the members of the consortium in the following ratio.

a) MAYTAS Infra – 40%
b) NCC Limited – 11%
c) SREI Infrastructure Finance – 38%
d) Sarat Chatterjee and Company Visakhapatnam Pvt Ltd – 11%

4. Subsequent thereto, a letter was addressed by the Machilipatnam Port on 28-08-2009, indicating that NCC Limited has been authorized to identify a lead promoter and strategic partner in view of the exit of SREI and SCPL and MAYTAS inability to carry forward with the Project. Based on the said request the Government vide reference 7th read above, permitted the induction of Navayuga Engineering Company Limited as the lead promoter of the Machilipatnam Port project in supersession of orders issued in the reference 1st and 3rd read above. It is necessary to mention that at various stages of the decision making process leading to revised constitution of the consortium, issues had been raised about the method and manner leading to the Govt. decision to continue the project with the revised consortium, and also with regards to the extent of land required for project as also continued requests for enhanced allocation of land disproportionate to the requirement of the project. In pursuance of the orders in the reference 7th read above, a revised concession agreement was entered into between the government and Machilipatnam Port incorporating the events leading to the said Concession Agreement. Clause 3.4 of the revised concession agreement indicates the shareholding pattern of the concessionaire pursuant to the induction of the lead promoter. It is necessary to note that until the date of the revised concession agreement no work on the ground was achieved in respect of any of the obligations under the concession agreement dated 21-04-2008, even though an extent of 412.57 Acres of land was handed over to Machilipatnam Port for the purposes of carrying out the obligations under the Agreement. Under the terms of the Concession Agreement, the Government is required to hand over the land on lease basis to MPPL and MPPL has not shown any inclination to enter into a lease deed in respect of the land and nor was any rental paid inspite of correspondence from the Government. The Concessionaire is in default of its obligations in regard to payment of lease rentals.

5. Further, in terms of the revised concession agreement, the commencement date would be 07-06-2010 and the timeline for financial closure would be 12 months from the Zero Date (Commencement Date). It is to be noticed that the induction of a strategic partner and the circumstances prior and subsequent to such induction would indicate that MPPL in its original composition or the revised composition did not have any intent to comply with the obligations imposed under the concession agreementas reflected inthe fact that they have not achieved the financial closure even till August, 2014. By letter dated 27-08-2014, while forwarding the revised DPR, MPPL requested the Government to extend the time for financial closure(3 years after the date agreed for the financial closure) and other milestones. In pursuance thereof Government by its letter dated 10-09-2015, extended the milestones as under.

1. Commencement date - Date of approval of DPR
2. Financial Closure – 12 months from the commencement date
3. Completion of port – 36 months from the commencement date

6. In pursuance of the letter dated 10-09-2015, the Government issued orders in the reference 9th read above, approving the modified DPR for Phase 1 – Stage 1 and the revised master plan in respect of Machilipatnam Port. As per the revised DPR Phase 1 stage 1 is proposed to be completed by 2017-18 and (overall Phase I) stage I-stage II is proposed to be

completed by 2021-22; capital cost estimates for Phase 1 – Stage 1 and stage I-stage II are 6778 Crores, 11924 Crore respectively; the traffic forecast for 2017-18 is 44.85 MTPA; during the Phase 1 – Stage 1, dock basin 1 with 2500 M-quay wall excluding that required for slope production and one liquid berth on lee side of the south brake water with pipeline trestle are proposed.

7. In March, 2017, the Department of Ports took over land to an extent of 2985 Acres (2513.76 acres government land and 471.28 acres assigned lands) and requested the Developer to take over the said lands. However continuing with its intent and conduct of being in fundamental breach of the Contract, MPPL vide its letter dated 14-03-2017 informed that they would take over the said land from the Port Department after compliance with the following.

1. Requisitioned land to be contiguous free of all encumbrances of the extent of 5324 Acres.
2. External infrastructure
3. Right of way to the Port Project area free from all encumbrances.

8. The said refusal was contrary to the terms of the Concessionaire Agreement. It is to be noticed that by 11-05-2017, MPPL was required to achieve the financial closure and is also required to complete phase-I Stage-I by 2017-18.

9. The conduct and the intent of MPPL is reflected in the fact that another revised DPR has been submitted seeking approval of the same from the Government in January, 2019 which indicates that no progress has been achieved on the project since 2008 except for repeated extensions and further concessions.

10. In spite of many concessions and extensions, including the acceptance of the request of the reconstitution of the consortium at the instance of a minority stakeholder, disproportionate allocation of lands, liberal extensions of time, which is shown to have been done in the interests of continuance of the project, enabling amendments to the agreement, even as of today there is no achievement of financial closure, which is one of the first and fundamental obligations under the concession agreement and notwithstanding the handing over of 412.57 Acres in October, 2008, there is no port related activity on the ground in the last 11 years. When the Government proposed the handing over of the land, to disguise its inability in securing the financial closure untenable and unworkable demands were raised on the Government, notwithstanding the many and repeated instances of the Government acceding to most requests of the Developer. The intent of the Developer to proceed with the project is thus non-existent with effect from 2008. It may be pertinent to mention that a revised DPR was submitted as late as January 2019 (after the completion of the period of construction of phase –I) to circumvent the process of financial closure, which is an evidence of unpreparedness of the Developer for the project

11. In order to support the project, the Government also took on an onerous obligation of meeting the additional estimated cost of Rs.335 crores due to the change in the location, if the consortium achieves financial closure. The intent of the Government and the lack of the intent on the part of the Company is shown in the fact that inspite of so many incentives proposed, no port-related work have commenced on the ground.

12. In terms of the principles of the Indian Contract Act, 1872 a breach of a fundamental nature in the context of even the first step of securing the financial closure not having been secured by MPPL, the Government is entitled to terminate the same and the termination of the Contract arising from a breach of such a fundamental nature could be resorted to under Section-39 of the Indian Contract Act, 1872 which course could be undertaken in addition to the clauses in the contract. The law is also settled that the fact/situation constituting the breach of

fundamental nature not being capable of demur in the light of the above and in the light of the correspondence till January, 2019, the only course available to the Government is to terminate the contract while reserving liberty to seek damages from MPPL under Section 75 of the Indian Contract Act as held by the Supreme Court in the case of Madhya Pradesh Rural Development Authority and another Vs. L.G. Chaudhary Engineers and Contractors reported in 2012(3)SCC 495. The entitlement of the innocent party to terminate such contract on the basis of a breach of a fundamental nature has been statutorily recognized under Section 39 of the Indian Contract Act, 1872.

13. The Government of Andhra Pradesh, having recognized the enormous economic potential of its long coastal line for development of international trade, is committed to promote rapid development of its ports. The Concessionaire has not only failed to realize the development potential of the port by inaction on the valuable resources for more than eleven years, but has also prevented its potential development by any alternative means. Thus, the Concessionaire has caused substantial loss to the State and Nation in terms of economic development and financial returns to the State. Every effort of the Government to handhold the project has turned in vain by reason of the conduct of the Developer and the events enumerated hereinabove. The non-securing of the financial closure, even at this distance of time, is a breach of such a fundamental nature, which has rendered the Agreement a non-starter. The Director of ports in the letter No.DoP/D2/798/2008, dated 24.12.2010 as referred to requirement of land as per original DPR in para 33 (iii)(a)

> The Detailed Project Report was prepared by the Consulting Engineering Services (India) Private Ltd., New Delhi and furnished by none other than Concessionaire viz. M/s.Vajra Seaports Private Limited (which is later renamed as M/s. Machilipatnam Port Limited) and the said DPR was mentioned in clause 1.19 of Revised Concessionaire Agreement.
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> The land requirements for Machilipatnam Port Development over Master Plan horizon as per DPR happens to be as shown below;

S.NO	PHASE (Year)	Area Requirement in Hectares	Area Requirement in Acres
1	Phase-I (2012)	69	170
2	Phase-II (2013)	85	210
3	Phase-III (2015)	126	311
4	Phase-I V(2020)	199	492
5	Phase-V (2029)	239	578
6	Final Phase (2038)	308	761
	Total	1021	2522

> As can be seen from the above, it is evident that the land requirement for Phase I & II is 310 acres and whereas the Developer was already in possession of acres 412.57 by October 2008. Thus as per the original DPR, it could have completed within the stipulated time. Further, had it taken over land as per para 7, it could have completed the entire project. Thus its intention to breach the contract at various times is a clear proof that it was not in compliance with any of the fundamental obligations with the

Concessionaire Agreement and seeking time for speculative reasons. This action has resulted in causing an irreparable loss affecting both National and State growth and investment. Public Interest is not being served by such actions of the Developer nor is the Government Policy of promoting Port activity bearing fruition.

14. In view of the above, Government after careful examination of the above matter is here by constrained to cancel the Concession Agreement dated 07-06-2010 with immediate effect in Public Interest. The land handed over on lease of 412.57 Acres on 09-10-2008 shall stand resumed to the Government with effect from the date of this G.O, while reserving liberty to claim compensation for the damages suffered by the Government in that regard from MPPL.

(BY ORDER AND IN THE NAME OF THE GOVERNOR OF ANDHRA PRADESH)

RAJAT BHARGAVA
PRINCIPAL SECRETARY TO GOVERNMENT

To
M/s. Machilipatnam Port Limited
20/32-A, Prathima Srinivasam, Narasimha Nagar,
Machilipatnam, Krishna District-521001.
The Municipal Administration & Urban Development Department
The Director of Ports, Kakinada
The District Collector, Krishna
The CMD, INCAP, Vijayawada
The VC, MUDA, Machilipatnam
Copy to:
The G.A.(Cabinet) Dept.,
The Finance Department
The OSD to Chief Secretary
The PS to Prl. Advisor to C.M
The PS to Spl. Secy to C.M.,
The PS to Prl. Secy. to III& C Dept.
SF/SC

// Forwarded :: By order //

Section Officer